

FOIA

(b)(7)(C)

The Privacy Exemptions

Presentation Goals



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- Review (b)(7)(C) FOIA determination process and relevant cases
 - Identify miscellaneous law enforcement privacy and public interest categories that may or may not apply
 - Review segregability obligations

Note: this is a generalized training. Specific determinations and consultation of resources (DOJ FOIA guide, case research, relevant SJA, etc.) will still be required.

Hello from Code 14!

- OJAG Code 14 is the Navy's general FOIA appeals office
- OGC assists with civilian, contract, other affairs
 - These offices also handle FOIA litigation (when it arises)
- HQMC and DNS-36/DONCIO run FOIA
- Code 13 provides initial command advice on FOIAs
 - But talk to your SJA/Resources first



Full text of (b)(7)(C)

- b) This section does not apply to matters that are—
 - (7) records or information compiled for **law enforcement purposes**, but only to the extent that the production of such law enforcement records or information
 - ...
 - (C) could **reasonably be expected** to constitute an unwarranted invasion of personal privacy
 - ...

FOIA (b)(6) and (b)(7)(C)

- The personal privacy exemptions of the FOIA
- Generally follow the same paradigm, BUT (b)(7)(C) is **categorically stronger for redaction and withholding of records.**
 - (b)(6) *personnel and medical files and similar files* the disclosure of which would constitute a clearly unwarranted invasion of personal privacy
 - (b)(7)(C) [*Law enforcement files*] could reasonably be expected to constitute an unwarranted invasion of personal privacy
 - NARA v. Favish, 541 U.S. 157, 165-66 (2004) (distinguishing between Exemption 6's and Exemption 7(C)'s language and noting that "Exemption 7(C)'s comparative breadth is no mere accident in drafting")

FOIA (b)(7)(c): How to process

Process of review for identified records for release:

- 1) Is the record requested compiled for law enforcement purposes?
- 2) Is there a significant privacy interest in the requested info?
- 3) What is the requester's asserted public interest in disclosure?
- 4) Balance the interests to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy"

BUT WAIT!!!!

That's the process for records you may want to acknowledge and release.

First...

...*GLOMAR, anyone?*

GLOMAR

Phillip v. CIA 655 F. 2d 1325 (D.C. Cir. 1981)

- CIA *Hughes Glomar Explorer* case. “*Can neither confirm nor deny...*”
- Appropriate when responding to **targeted** requests for documents regarding alleged government informants, trial witnesses, investigative subjects, individuals mentioned in law enforcement records.
- **Can** use even if no records exist.
- **Cannot** use if an investigation has already been :
 - officially acknowledged (by the agency or the subject) *CREW v. DOJ*, 746 F.3d 1082, 1091- 92 (D.C. Cir. 2014)
 - requests that do not sufficiently target an individual. *PETA v. NIH*, 745 F.3d 535, 544-45 (D.C. Cir. 2014)

GLOMAR

Application to (b)(7)(C)

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- *Antonelli v. FBI*, 721 F.2d 615, 617 (7th Cir. 1983) (concluding that "even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect").
 - "There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of [a law enforcement] investigation." *PETA v. NIH*, 745 F.3d 535, 540 (D.C. Cir 2014) (quoting *PETA v. NIH*, 853 F.Supp.2d 146, 154–59 (D.D.C.2012)).
 - May need to bifurcate between law enforcement and non-law enforcement records. *See generally* FOIA Update, Vol. XVII, No. 2, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy 'Glomarization'") (providing guidance on how agencies should handle requests for law enforcement records on third-parties).

GLOMAR

Application to (b)(7)(C)

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- *Schwarz v. United States Dep't of Treasury*, 131 F. Supp. 2d 142 (D.D.C. 2000), aff'd, 2001 U.S. App. LEXIS 13882 (D.C. Cir. May 10, 2001): Upheld “Glomar” response where requester did not have consent to disclosure and disclosure would not be informative of agency’s performance of duties.
 - *Boyd v. Crim. Div. of the DOJ*, 475 F.3d 381, 388-89 (D.C. Cir. 2007): Glomar was improper where informant’s identity had already been acknowledged—but court declined to remand because all remaining information was protected by (b)(7)(C).

So really the process is...

Process of review:

- 1a) Is the record already acknowledged/do you want to acknowledge?
- 1b) Is the record requested compiled for law enforcement purposes?
- 2) Is there a significant privacy interest in the requested info?
- 3) What is the requester's asserted public interest in disclosure?
- 4) Balance the interests to determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy"

BUT WAIT!

... (Again)

Do you even need to search for records you know are categorically law enforcement records?

Do you even need to search?

Graff v. FBI, 822 F. Supp. 2d 23, 29-30 (D.D.C. 2011)

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- FBI refused to produce records in absence of a death certificate, privacy waiver, or a clear demonstration that the public interest in disclosure outweighed the personal privacy interest *and* that significant public benefit would result from the disclosure of the requested records.
 - “When a request by its terms specifically calls for law enforcement records related to a third party, all of the responsive records will fall within the scope of the categorical exemption unless it can be shown that the invasion of privacy is “warranted.” 5 U.S.C. §552(b)(7)(C).
 - It is more efficient and it imposes no improper burden on the requester to establish a procedure whereby the government performs the necessary balancing once for the entire class of requested records before going through the time and expense of a search. 822 F. Supp. 2d 23, 34 (D.D.C. 2011)”

Do you need to search?

- SO: did requester identify info to permit balancing public/private interests in requested records?
 - *Blackwell v. FBI*, 646 F. 3d 37, 42 (D.C. Cir. 2011) (holding that agency "was correct in declining to search" for records pertaining to certain third parties because it "would have added only information that [the court has] concluded is protected by Exemption 7(C)."
 - BUT *Bonilla v. DOJ*, No. 10-22168, 2011 WL 122023, at *3 (S.D. Fla. Jan. 13, 2011) (rejecting categorical withholding and finding that "[d]efendant has not met its burden of showing the type of record requested by Plaintiff would not reveal any 'official information' about a government agency").
- Once a requester identifies a public interest in the requested information, however, an agency may be required to search for and review records in order to effect the balancing required under Exemption 7(C).
 - *CREW. v. DOJ*, 854 F.3d 675, 683 (D.C. Cir. 2017) (rejecting categorical denial of investigatory records related to investigation of member of Congress, since connecting this info to names "could add much, or not at all, to the public's understanding of how the Gov't carried out its investigation").

Okay – so we have decided a search is needed

What now?

1. Is the record compiled for law enforcement purposes?

- “In 1986, Congress amended [Exemption 7] to protect 'records or information compiled for law enforcement purposes,' deleting any requirement that the information be 'investigatory....It is clear that, under the amended threshold of Exemption 7, an agency may seek to block the disclosure" of materials generated by the agency "even when the materials have not been compiled in the course of a specific investigation" *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002).
- The effect of the amendment is that Exemption 7 "now applies more broadly." *North v. Walsh*, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989).
- The term "law enforcement" in Exemption 7 refers to the act of **enforcing the law, both civil and criminal**. *Pub. Emples. for Env'tl. Responsibility v. United States Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 203 (2014) (citing *Tax Analysts v. IRS*, above).

(Cases above cited in *Humane Soc'y of the United States v. Animal & Plant Health Inspection Serv.*, 386 F. Supp. 3d 34, 48 (D.D.C. 2019)

1. Is the record compiled for law enforcement purposes?

- The "ordinary understanding of law enforcement includes . . . proactive steps designed to prevent criminal activity and to maintain security." *Milner v. Dep't of Navy*, 562 U.S. 562, 582, (2011) (Alito, J., concurring).
- "[L]aw enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law." *Pub. Emps. for Envtl. Resp. v. U.S. Sect., Int'l Bdy. & Water Comm'n*, 740 F.3d 195, 203, 408 U.S. App. D.C. 61 (D.C. Cir. 2014) ("PEER").
- (Cases above cited in *Humane Soc'y of the United States v. Animal & Plant Health Inspection Serv.*, 386 F. Supp. 3d 34, 48 (D.D.C. 2019))

1. Is the record compiled for law enforcement purposes?

- BUT: distinction between law enforcement and HR enforcement:
- *Rural Housing All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 77, 81-82 (D.C. Cir. 1974).
(Distinguishing between investigatory files compiled for oversight of employees and filed connection with investigations focused on specific alleged illegal acts).
 - Acting as an *employer* is not the same as acting as an *enforcer*. BUT may still be covered by (b)(6)!!!
- *Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 176-77, (D.C. Cir. 2002) (“Whether records are ‘compiled for law enforcement purposes’ depends on “how and under what circumstances the requested files were compiled . . . and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.”)(and citing *Rural Housing*).

2. Is there a Privacy Interest?

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United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)

- “FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.” (pg 774-75)
- When the subject...is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances.... **Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy.**

2. Is there a Privacy Interest?

- Take away: Requests for law enforcement records pertaining to a private citizen categorically invades that citizen's privacy. Where a request seeks no official information about a government agency, the privacy invasion is unwarranted
- (b)(7)(C) ALSO protects investigative subjects, witnesses, informants, third parties, etc.
 - *SafeCard Services v. SEC*, 926 F.2d at 1206 (D. C. Cir. 1991) based upon the traditional recognition of the strong privacy interests inherent in law enforcement records, and the logical ramifications of *Reporters Committee*, the categorical withholding of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).
- Law enforcement officer names are protected to avoid harassment or annoyance in their official or personal lives. Administrative staff can also be withheld, due to their access to sensitive information

2. Is there a Privacy Interest?

- “The mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” *Fitzgibbon v. CLA*, 911 F.2d 755, 767 (D.C. Cir. 1990)
- Passage of time will not ordinarily diminish (b)(7)(c) privacy protection
 - *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (“Confidentiality interests cannot be waived through . . . the passage of time.”)
 - *Fitzgibbon v. CLA*, 911 F.2d 755, 768 (D.C. Cir. 1990) (concluding that passage of more than thirty years irrelevant when records reveal nothing about government activities)

2. Is there a Privacy Interest?

- Even if some information was made public before:
 - *NARA v. Favish*, 541 U.S. at 171: that some death scene photos were released by agency did not diminish privacy interest in remaining photos.
 - *Prison Legal News v. EOUSA*, 628 F.3d 1243, 1249-50 (10th Cir. 2011): finding privacy interest where video/photos were no longer available to public and were displayed only twice at the defendant's trial. Only those physically present could see – never reproduced otherwise.
- But See...
 - *Outlaw v. U.S. Dep't of the Army*, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (ordering release of twenty five-year-old photographs of murder victim with no known surviving next of kin).
 - *Davin v. DOJ*, 60 F.3d 1043, 1058 (3d Cir. 1995) (finding that for some individuals, privacy interest may become diluted by passage of over sixty years, though under certain circumstances potential for embarrassment and harassment may endure)

Miscellaneous (b)(7)(C) Privacy Interest

- Trial testimony:
 - Plaintiff's assertion that informant and others who testified at his criminal trial waived their right to privacy by testifying is "simply wrong." *Boyd v. U.S. Marshals Serv.*, No. 99-2712, slip op. at 5 (D.D.C. Mar. 30, 2001)
 - But see also: no justification for withholding identities of witnesses who testified against requester at trial. *Linn v. DOJ*, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (appeal dismissed voluntarily, No. 97-5122 (D.C. Cir. July 14, 1997)).
- Privacy rights do not extend to corporations.

Miscellaneous (b)(7)(C) Privacy Interest

- Practical obscurity standard applies to (b)(7)(C) reviews as well.
 - *Rose v. Dep't of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) (noting that "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information"
 - *Judicial Watch v. DHS*, 736 F. Supp. 2d 202, 211 (D.D.C. 2010) (finding "that the passage of time has not diluted the privacy interest at stake and, if anything, has actually increased [the] privacy interest as the events surrounding the . . . prosecution have faded from memory"
 - But: *ACLU v. DOJ*, 655 F.3d 1, 9-10 (D.C. Cir. 2011), stating the docket information requested was still easily retrievable and thus not subject to practical obscurity.
- Not lost even if information can be pieced together from other sources.
 - *Fiduccia v. DOJ*, 185 F.3d 1035, 1047 (9th Cir. 1999) (protecting FBI records reflecting information that is also available in "various courthouses.")

Miscellaneous (b)(7)(C) Privacy Interest

- *Bast v. DOJ*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (finding that "previous publicity amounting to journalistic speculation cannot vitiate the FOIA privacy exemption")
- *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998) (reasoning that merely because subject of investigation acknowledged existence of investigation – thus precluding Glomar response – does not constitute waiver of subject's interest in keeping contents of OPR report confidential);
- *Parker v. DOJ*, 214 F. Supp. 3d 79, 88 (D.D.C. 2016) (determining former AUSA and other named individuals retained a substantial privacy interest in undisclosed records related to OPR investigation even if certain other information had been publicly disclosed)

3. Is there a Public Interest?

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- When the subject...is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir.... Accordingly, we hold as a categorical matter that ...when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."

3. Is There a Public Interest?

- “Where the privacy concerns . . . are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure... the public interest sought to be advanced [must be] a significant one, an interest more specific than having the information for its own sake.”
NARA v. Favish, 541 U.S. 157, 172 (2004) (regarding (b)(7)(C) companion)

3. Is There a Public Interest?

- What is the asserted interest?
 - *Graff v. FBI*, 822 F. Supp. 2d 23, 33-34 (D.D.C. 2011) (recognizing "special burden" on requester in Exemption 7(C) context and noting "it would be inefficient and impractical, and ultimately, unfair to the requesters, to depend upon the government to guess what the requesters had in mind and to catalogue the possible public reasons for disclosure");
 - *Lewis v. DOJ*, 867 F. Supp. 2d 1, 19 (D.D.C. 2011) (holding that "[i]t is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant" (citing *Favish*, 541 U.S. at 172)).
 - *Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989) (observing that "merely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure"
- Is there a nexus between the information requested and the public interest asserted?
 - *Peltier v. FBI*, 563 F.3d at 765-66 (upholding Exemption 7(C) redactions because court was "not convinced that there is a substantial nexus" between request and requester's asserted public interest, and finding that any public benefit from disclosure is "too uncertain and remote")

3. Is there a Public Interest?

- Comprehensiveness of an investigation; accuracy of public release, accountability of seniors. *Stern v. FBI* 737 F.2d 84, (D.C. Cir. 1984)
 - The more senior the position, the greater accountability to the public.
- Misuse of agency investigative resources (for political efforts, tracking first amendment expressions, etc.).
- *ACLU v. DOJ*, 655 F.3d 1, 14 (D.C. Cir. 2011) (finding valid public interest where requesters sought to show nature, effectiveness, and intrusiveness of government's policy regarding warrantless cell phone tracking, and specifically noting that "plaintiffs are not (or at least not only) seeking to show that the government's tracking policy is legally improper")

3. Is there a Public Interest?

- How much information is already in the public domain? What will these new records add?
 - *Prison Legal News v. EOUSA*, 628 F.3d 1243, 1251 (10th Cir. 2011) (noting that because alleged public interests already satisfied by materials viewed and reported on by media related to trial, any "incremental addition" to public knowledge was outweighed by privacy interest).
- Is this a death penalty case?
 - *Roth v. DOJ*: ordered release of information where the requester "show[ed] that a reasonable person could believe that the following might be true: (1) that the [subjects of the request] were the real killers, and (2) that the [agency was] withholding information that could corroborate that theory.

Miscellaneous (b)(7)(C) Public Interest

- General interest in trial fairness/objecting to your own conviction is insufficient
 - *Peltier v. FBI*, 563 F.3d 754, 764 (8th Cir. 2009) (per curiam) (holding that "a prisoner may not override legitimate privacy interests recognized in Exemption 7(C) simply by pointing to the public's interest in fair criminal trials or the even-handed administration of justice")
- Must provide more than “bare suspicion” that the government has engaged in misconduct
 - “[A]llegations of misconduct are 'easy to allege and hard to disprove...[a requester] must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred' before there will 'exist a counterweight on the FOIA scale to balance against the cognizable privacy interests in the requested records.’”
NARA v. Favish.

Miscellaneous (b)(7)(C) Public Interest

- *Labr v. NTSB*, 569 F.3d 964, 979 (9th Cir. 2009) (finding that where "only way that [third parties] mentioned . . . would have public value is if [they] were contacted directly by the plaintiff or by the media is insufficient to override the witnesses' and agents' privacy interests, as the disclosure would bring about additional useful information only if direct contacts, furthering the privacy intrusion, are made")

4. Balancing Interests for Release

- The test is the same as in (b)(6): first determine privacy interests, then public interests. However, privacy interests are weightier under (b)(7)(C).
- Same rule as (b)(6): something beats nothing every time. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)
- *Cole v. FBI*, No. 13-01205, 2015 WL 4622917, at *3 (D.D.C. July 31, 2015) ("The Court concludes, however, that it need not reach the step of balancing private and public interests because [plaintiff] has not provided sufficient evidence of any public interest to be balanced.")

4. Balancing Privacy Interests

- The relevant question in public interest analysis “is not whether the public would like to know the names . . . but whether knowing those names would shed light on the [agency's] performance of its statutory duties.” *McGehee v. DOJ*, 800 F. Supp. 2d 220, 234 (D.D.C. 2011)
 - “The mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.” *Fitzgibbon v. CIA*, 911 F.2d 755(D.C. Cir. 1990)
 - Personal curiosity about names of third parties, agents, is insufficient to outweigh privacy interests. *Schrecker v. DOJ*, 74 F. Supp. 2d 26, 34 (D.D.C. 1999), rev'd on other grounds, 254 F.3d 162, 166 (D.C. Cir. 2001)
 - Third parties to investigations have a strong privacy interest. *Peltier v. FBI*, 563 F.3d 754 (8th Cir. 2009)
 - Errant release does not mandate further release. *Canning v. DOJ*, 567 F. Supp. 2d 85, 95 (D.D.C. 2008)

Segregability of Records

- **Segregability still applies!!!**
 - **Review should determine if any information is releasable** based on the privacy interests, how they can be protected, and public interest balancing.
 - BUT if can provide declaration and Vaughn index to show nonexemption is inextricably intertwined with exempt portions, can withhold in entirety.
 - *Ocasio v. United States DOJ*, Nos. 17-5005, 17-5085, 2017 U.S. App. LEXIS 16147, at *2 (D.C. Cir. Aug. 23, 2017) (citing *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260-61, (D.C. Cir. 1977)).

What if we miss a redaction?

- Inadvertent failures don't strip a 3rd party of privacy interests.
 - *Canning v. DOJ*, 567 F. Supp. 2d 85, 95 (D.D.C. 2008)
 - *Billington v. DOJ*, 69 F. Supp. 2d 128, 137 (D.D.C. 1999) (deciding that disclosure of unredacted records due to administrative error did not "diminish the magnitude of the privacy interests of the individuals" involved), aff'd in pertinent part, 233 F.3d 581, 583 (D.C. Cir. 2000)

Final comments

- Word often turns the (c) into a copyright symbol
- Don't forget to cite other exemptions as needed – both (b)(6) and (b)(7)(C) are often cited in tandem.
- Being able to articulate your basis is *critical!*
- NCIS is the only release authority for NCIS records.
 - Contact their FOIA office if you have incorporated their files into another somehow.

THE NEXT LESSON

- Next FOIA training: likely (b)(5).
 - LOTS to discuss!!! Date TBD – so keep an eye out!